United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

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76-2132

To be argued by
PAUL F. CORCORAN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-2132

CHARLES SMITH,

Appellant,

—against—

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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Preliminary Statement

CHARLES SMITH appeals from an order of the United States District Court for the Eastern District of New York (Mishler, J.), dated September 13, 1976, which denied appellant's application pursuant to 28 U.S.C. § 2255 for vacation of his conviction and the ten year sentence imposed thereon. Appellant, having been released from incarceration, is presently on parole pursuant to said sentence.

On appeal, it is alleged that the District Court erred in refusing to set aside appellant's guilty plea as: (1) having been imposed for a crime which appellant could not have committed; and (2) having been coerced by advice of a potential 25 year mandatory sentence which could not legally have been imposed.

Statement of the Case

The facts in this case are undisputed.[1]

On May 30, 1972, John Talton, a Special Agent with the then Bureau of Narcotics and Dangerous Drugs, was robbed of approximately Five Thousand Dollars ($5,000.00) of Government funds which were in his custody at the time. Talton, while acting in an undercover capacity, was to have used the funds to purchase narcotics that evening in a transaction arranged by the appellant Charles Smith. Shortly after 11:00 P.M., as Talton awaited the arrival of the drug dealers in a hotel room at the Anchor Motor Inn in Bayside, Queens, three individuals, later identified as A.C. Doyle, Herman Robertson and Ronald Johnson, entered the room brandishing guns. A .38 caliber revolver was put to Talton's head; he was tied up with belts and stockings; and the Government's funds were taken from him.[2]

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[1] The petition here was originally assigned to the Honorable Orrin Judd, who held an evidentiary hearing which was concluded on May 4, 1976. Decision was reserved. Judge Judd subsequently passed away, and the proceeding was reassigned to Judge Mishler. On August 6, 1976 the case was called for argument before Judge Mishler. At that time appellant's counsel agreed that the motion, being a question of law, could be decided without reference to the minutes of the hearing before Judge Judd.

[2] At the time of sentencing, Smith's counsel and the Court discussed the probability that Smith was unaware that Talton was a Government agent, but intended rather to double-cross a fellow drug dealer. Lack of knowledge as to Talton's status or the true ownership of the money is, of course, no defense. *See United States* v. *Feola*, 420 U.S. 671 1975; *United States* v. *Jermendy*, Second Circuit Slip Op. No. 351, decided November 4, 1976.

After their arrests, Robertson and Johnson, who cooperated with the Government and testified in the Grand Jury, revealed that the robbery had been directed by the appellant Charles Smith. It was Smith who had sent Robertson, Johnson and Doyle to Talton's room at the Anchor Motor Inn; and he had waited outside in his car while the robbery took place. For his part in the robbery, Smith received half of the proceeds.[3]

Smith, together with his three accomplices, was subsequently indicted on five counts. Count one charged robbery of Five Thousand Dollars ($5,000.00) of money belonging to the United States, which was in the care, custody and control of John Talton (parenthetically denominated a violation of Title 18, U.S.C. § 2114 [4] and § 2). Count two charged that the defendants effected the robbery of the United States funds from John Talton by use of a dangerous weapon, thus placing Talton's life in jeopardy (parenthetically denominated a violation of Title 18, U.S.C. § 2114 and § 2). Count five charged the defendants with stealing Five Thousand Dollars ($5,000.00) of money belonging to the United States (parenthe-

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[3] The above facts were set forth in the Government's memo below and were not disputed by the petitioner. *See Governments' Response to Defendants' Petition* at pp. 2-3.

[4] Title 18, U.S.C. § 2114 provides:

> *Whoever* assaults any person having lawful charge, control, or custody of any mail matter or of any money or other property of the United States, with intent to rob, steal, or purloin such mail matter, money, or other property of the United States, or *robs any such person of* mail matter, or *of any money,* or other property *of the United States,* shall, for the first offense, be imprisoned not more than ten years; and if in effecting or attempting to effect such robbery he wounds the person having custody of such mail, money, or other property of the United States, or puts his life in jeopardy by the use of a dangerous weapon, or for a subsequent offense, shall be imprisoned twenty-five years (emphasis added).

tically denominated a violation of Title 18, U.S.C. § 641 [5] and § 2).[6]

1972 Conviction

On July 17, 1972, the appellant sought to enter a plea of guilty to count one of the indictment. The Honorable Orrin Judd, to whom the case had been assigned, carefully questioned the appellant to determine whether the plea was made voluntarily and with full knowledge of its consequences. The defendant stated that he understood the charges in the indictment (App. H., p. 13);[7] that he was satisfied with his attorney, Leslie Nizen (App. H., p. 13); that he understood that he had all the rights of a criminal defendant at trial (App. H., p. 14); and that no

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[5] Title 18, U.S.C. § 641 provides:

> *Whoever* embezzles, *steals*, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of *any* record, voucher, *money, or thing of value of the United States* or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or
>
> Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted——
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.
>
> The word "value" means face, par, or market value, or cost price, either wholesale or retail, whichever is greater (emphasis added).

[6] Counts three and four, which charged the defendants with assaulting a federal officer with a deadly weapon, are not relevant to this proceeding.

[7] Unless otherwise specified parenthetical page references are to the appellant's appendix on appeal.

one had coerced him or induced him into pleading guilty (App. H., pp. 17-18).

Judge Judd then questioned the appellant as to his understanding of the charge contained in count one, and the penalty he faced by entering a guilty plea to it:

> The Court: The Count charges that on or about May 30, 1972, you with others robbed a person who had custody of United States funds in the amount of Five Thousand Dollars.
>
> Do you want me to read the rest of the indictment?
>
> Smith: No, I know what it is.
>
> The Court: This carries a potential penalty of imprisonment for not more than ten years.
>
> Smith: Yes sir.

(App. H., p. 14).

A discussion then ensued concerning any agreements the defendant might have made with the Government regarding the remaining four counts of the indictment. Defense counsel and the Assistant United States Attorney placed on the record the understanding that the remaining counts, including count two which carried a twenty-five (25) year mandatory sentence, would be dismissed only if appellant gave the Government his full cooperation with regard to his narcotics connections (App. H., pp. 14-16).[8]

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[8] Such cooperation was not forthcoming. Indeed the defendant instead became a fugitive shortly after the July 17th pleading. Though the twenty-five year count was dismissed at time of sentencing, the appellant never fulfilled his portion of the agreement (App. I., p. 5).

No other promises having been made to the defendant to induce his plea (App. H., p. 17),[9] the Court and the appellant engaged in the following colloquy concerning appellant's participation in the robbery charged:

> The Court: Can you tell me what you did, please?
>
> Smith: Outside the hotel I told them there was someone in the room with a large amount of money; that there was a drug dealer in room 116 and then I left and I imagine they proceeded inside to commit the robbery.
>
> The Court: You told them he was there and that he had money and you expected that they would go in and rob him didn't you?
>
> Smith: Yes sir.
>
> * * * * *
>
> The Court: Did you expect they would have trouble getting it from the party or parties involved?
>
> Smith: I didn't know exactly what they was going to do, what means they would take to get it or if they would take it at all. I just supplied information.
>
> The Court: Did you think they would make threats in order to get the money from him?
>
> Smith: I imagine so, Your Honor.
>
> The Court: All right.

(App. H., pp. 18-19).

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[9] Although the Government had not agreed to dismiss count two in return for the appellant's plea to count one, the Court did inquire whether anything "other than the risk of going to jail for twenty-five years" (App. H., p. 17) had induced him to plead guilty. The defendant responded in the negative (*id.*).

After the defense counsel recommended acceptance of the plea of guilty, the Court found that appellant's guilty plea was made "voluntarily and with knowledge of the defendant's rights and the knowledge of the consequences" (App. H., p. 20). After expressedly finding a factual basis for the plea, it was accepted. (id.).

At the time of sentencing, Judge Judd gave the appellant an opportunity to withdraw his guilty plea. In so doing, the court indicated its concern about a statement in the pre-sentence report wherein appellant maintained his innocence, and claimed to have pleaded guilty in order to avoid the twenty-five year sentence under count two of the indictment (A. I., pp. 5, 17). Confronted with this opportunity, the defendant chose not to withdraw his guilty plea (App. I., p. 18), and, instead, reaffirmed his participation in the robbery:

> The Court: . . . You knew at the time, Mr. Smith, that your co-defendants, Mr. Doyle and Mr. Robertson and Mr. Johnson were going to go in and take the money that this agent had: did you not?
>
> Smith: I didn't know. The agent was there with another fellow who was in the room, that I knew——
>
> The Court: You knew he had some money?
>
> Smith: Yes.
>
> The Court: You intended that they would get the money from him, is that right?
>
> Smith: Yes.

(App. I., p. 18-19).

The Court then imposed a sentence of ten years imprisonment "on indictment 72-Cr-672" (App. I., p. 27).

Post-Conviction Relief

As a result of this Court's rulings in *United States* v. *Reid*, 517 F.2d 983 (2d Cir. 1975) and *United States* v. *Rivera*, 513 F.2d 519 (2d Cir. 1975), which held that 18 U.S.C. § 2114 is limited to offenses having a "postal nexus"—to postal-related assaults and robberies—appellant filed the instant petition under 28 U.S.C. § 2255, seeking collateral relief in the form of a vacatur of his conviction and a dismissal of the indictment (App. C). In addition to claiming that "the citation of [2114] in [counts one and two] was error, petitioner alleged that his guilty plea to count one was "entered to avoid the danger of the fixed twenty-five year penalty of Count two which he was incorrectly advised was the necessary result of conviction on Count two." It was argued that he "waived trial rights based on misinformation as to the nature of the charges and their potential penalties" (App. C, at p. 4).

In denying appellant's petition, Chief Judge Mishler, to whom the case was reassigned, found, first, that appellant's guilty plea was not so affected by the intervening change in the law, brought on by *Rivera* and *Reid*, as to justify the collateral relief sought. Since the robbery of U.S. funds, which appellant admitted in his guilty plea, constituted a violation of federal law under sections other than § 2114, *i.e.*, 18 U.S.C. §§ 641 and 2112, no "miscarriage of justice" would be worked by denying the petition. Indeed, under the circumstances, the Court considered appellant's complaint to be one of "miscitation", which is without remedy absent a showing of prejudice to the defendant. Secondly, as to appellant's claim that he was prejudiced, in that erroneous advice as to the applicability of the twenty-five year mandatory sentence under § 2114 had a coercive impact on his plea of guilty, the Court, relying on *Brady* v. *United States*, 397 U.S. 742 (1970), found that the guilty plea was

voluntary and intelligent when entered, and was not subject to collateral attack by reason of a subsequent change in the law. Judge Mishler concluded that "essential justice" was not here affected, stating "[i]t would be pointless to overturn petitioner's guilty plea 'when there is no significant question concerning the accuracy of the process by which judgment was rendered' " (App. B., p. 15).

ARGUMENT

POINT I

Appellant's guilty plea was voluntarily and intelligently entered under the law as construed in 1972.

Appellant's attack upon the District Court's ruling, and, indeed, his grounds for collateral attack, rest primarily upon an erroneous premise—that this Court's rulings in *United States* v. *Rivera*, 513 F.2d 519 (2d Cir. 1975), *supra*, and *United States* v. *Reid*, 517 F.2d 983 (2d Cir. 1975), *supra*, effected no "change in the law", but merely clarified the state of the law as it existed at the time of appellant's 1972 guilty plea. Since a "postal nexus" has always been required under § 2114, appellant argues, the failure of the Court and counsel to advise him of that essential element in July of 1972 deprived him of the knowledge necessary to enter a "voluntary and intelligent" plea. Moreover, the erroneous advice he received that he faced a twenty-five year mandatory sentence if convicted on count two rendered his plea misinformed. In short, appellant contends that he entered his 1972 plea without knowing the true nature of the charges against him or the real consequences of his alternatives. Finally, it is upon this same erroneous premise that appellant argues that his plea lacked the requisite

factual basis for all the essential elements of the crime charged. Appellant's arguments are specious.

As Judge Mishler noted below, the advice given to the appellant Smith before he entered his guilty plea fully comported with the requirements of § 2114 as it was then construed. Appellant was advised that he was charged with robbing another person of United States funds in the amount of $5000; and he was advised that such crime carried a potential penalty of imprisonment of not more than 10 years (App. H., p. 14). A violation of § 2114, as then construed, was thereby established.

That *Reid* and *Rivera* effected a "change in the law" by construing § 2114 to require a postal nexus is clear from this Court's opinions therein, as well as from decisional law in effect at the time of appellant's plea. Prior to July 17, 1972, several Circuits had considered convictions under § 2114 based upon robberies and assaults which were unrelated to postal services. *United States* v. *Sherman*, 421 F.2d 198 (4th Cir.), *cert. denied sub nom. Sherman* v. *United States*, 398 U.S. 914 (1970); *United States* v. *O'Neill*, 436 F.2d 571 (9th Cir. 1970); *United States* v. *Hanahan*, 442 F.2d 649 (4th Cir. 1971), *vac. and rem'd*, 414 U.S. 807 (1973). In none of those cases was a "postal nexus" required. Indeed, the issue was never even raised.

In *United States* v. *O'Neill*, *supra*, just two years prior to appellant's guilty plea, the Ninth Circuit considered whether under sections 2114 and 641 a conviction could be sustained for both theft of Government funds and the unlawful receipt thereof. The defendant had been charged with aiding and abetting the robbery of money and property of the United States from a federal Customs employee. Concluding that a person could not be convicted of both theft and receipt of the same Government property, the Court reversed the conviction and

remanded for a new trial. Significantly, there was no suggestion that there was any "postal nexus" involved factually; nor did the Ninth Circuit find that § 2114 required such an element.

The same year, the Fourth Circuit in *United States* v. *Sherman, supra,* affirmed a conviction for placing a life in jeopardy in the course of a robbery in violation of § 2114. The offense in *Sherman* was predicated on the robbery of money from an Air Force commissary. Here again, the opinion was devoid of any reference to a "postal nexus"; yet the conviction was sustained.

Finally, in May of 1971, the Seventh Circuit, in *United States* v. *Hanahan, supra,* considered the § 2114 conviction of a defendant for robbery of Internal Revenue Service employees. The defendant had been sentenced to twenty-five years imprisonment under the section's mandatory sentencing provisions. In affirming the conviction, the Court made no reference to any requirement of a "postal nexus".[10]

Appellant relies upon *United States* v. *Spears,* 449 F.2d 946 (D.C. Cir., 1971), for the proposition that the District Court and prosecution were on notice in 1972 that a "postal nexus" was required for a violation of §2114. Such reliance is misplaced. Though *Spears* did construe §2114 to prohibit assaults and thefts having a postal nexus, it did not so limit the statute. Since the operative facts in *Spears* concerned an attempted rob-

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[10] As noted *infra, Hanahan* was subsequently considered by the Supreme Court in 1973, at which time the applicability of § 2114 to the offense charged was apparently raised for the first time. After the Solicitor General submitted a memo conceding the requirement of a "postal nexus", the case was remanded for resentencing under a more appropriate statute, § 2112. See *United States* v. *Rivera,* 513 F.2d, at 532-33.

bery of postal employees, the Court had no occasion to delimit the scope of § 2114, or to consider its applicability to non-postal cases.

It was not until *Hanahan* reached the United States Supreme Court in 1973 that the requirement of a "postal nexus" in §2114 violations was first suggested. Though the Supreme Court wrote no opinion publishing the "change in law", the Solicitor General did submit a memorandum of law to the Court in *Hanahan* conceding that the legislative history of §2114 supported the argument that the section proscribed only offenses having a postal nexus. See *United States* v. *Rivera*, *supra*, 513 F.2d at 532. Based upon the Solicitor General's memo, the *Hanahan* conviction was vacated and the case was remanded for reconsideration. 414 U.S. 807. Since the Supreme Court's action in *Hanahan* occurred over a year after appellant entered his guilty plea, it could hardly have been anticipated by the prosecution or the Court at the time of appellant's plea.

The first circuit court opinion to suggest limitations in the scope of section 2114 appeared in 1974. The Ninth Circuit in *United States* v. *Fernandez*, 497 F.2d 730, almost two years after appellant's plea, treated the questions as one of first impression. Finding no conclusory decisional law on the point, the Court referred to the legislative history for resolution of the issue.

In this Circuit, the scope of section 2114 was initially considered in *United States* v. *Rivera*, *supra*, three years after appellant's plea. In a fact-pattern similar to the instant case, the Court, in an opinion by Judge Friendly, reversed the conviction of a defendant for murder and assault which occurred during the robbery of an undercover agent of the Bureau of Narcotics & Dangerous Drugs. To sustain the position the Solicitor General had taken in *Hanahan* in 1973, Judge Friendly again felt

it necessary to resort to the legislative history of §2114 in order to conclude that a "postal nexus" was in fact required.

A month later, this Court considered a conviction arising out of a 1974 robbery of a Drug Enforcement Administration agent, *United States* v. *Reid*, *supra*. Noting that "further research . . . has made the correctness of that view even clearer", the *Reid* panel, again in an opinion by Judge Friendly, sustained the reasoning set forth in *Rivera* by delving even further into the legislative history for justification. But the opinion was not without opposition. Judge Mansfield, dissenting, disputed the requirement of a postal nexus under §2114. He found the section to be "unambiguous and clear on its face", and criticized the majority for resorting to legislative history for purposes of statutory construction. On the principle that "the proper time-tested procedure is first on consult the statute and be guided by its plain meaning with resort to legislative history only when the statute appears ambiguous", Judge Mansfield would have sustained the *Reid* and *Rivera* convictions, stating:

> "Section 2114 is not even slightly ambiguous. It plainly provides in clear and unequivocal language that '[w]hoever assaults *any* person having lawful charge, control or custody of any mail matter, *or of any money or other property of the United States*, . . . or robs *any such person* of mail matter, *or of any money or other property of the United States*' (emphasis added), is guilty of a crime . . .". 517 F.2d at 968.

Holding section 2114 broadly applicable to robbery of any government agent, Judge Mansfield concluded: "If Congress had wanted to limit the offenses prohibited by section 2114 to any assault on a postal employee or any assault upon a person holding money or other property

in the custody of the United States Postal Office, it surely knew how to do it." 517 F.2d at 968-69.[11]

Clearly, this Court's decisions in *Reid* and *Rivera* did effect a "change in the law" of this Circuit regarding the scope of §2114. Prior thereto, and certainly at the time appellant entered his guilty plea, the prevailing statutory construction, implicit in *O'Neill*, *Sherman* and *Hanahan*, gave full import to the statutory language prohibiting robbery of *any money* or *property* of the United States, whether postal or otherwise. On July 17, 1972, when appellant entered his guilty plea to the robbery of John Talton, he did so after being fully advised of all the essential elements of an offense under §2114 as it was then authoritatively construed. Moreover, the appellant was properly advised that he then faced a twenty-five year mandatory sentence if convicted under count two of the indictment pending against him. Accordingly, appellant's contention that his 1972 guilty plea was predicated upon

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[11] Beyond disputing the majority's resort to legislative history in face of a statute clear and unambiguous on its face, Judge Mansfield set forth considerable support in that legislative history for a broader definition prohibiting "the crime of robbing or attempting to rob custodians of Government monies" generally. 517 F.2d at 970. Questioning the majority's heavy reliance upon the *Hanahan* memo of the Solicitor General, who it was noted, "possesses no specialized or unusual knowledge about the language or history of § 2114 entitling his opinion to any special deference", 517 F.2d at 970-71, Judge Mansfield pointed to the unwarranted disparity created by the Court's construction of § 2114; "Under the majority's strained interpretation of § 2114, the violent attempted robbery of a person having custody of postal property would carry a mandatory 25-year sentence whereas the successful robbery of a person having custody of other government money or property would be punishable by a maximum of 15-years imprisonment under § 2112. . . . This meaningless disparity would be eliminated by a holding that a violent robbery of a custodian of any government property (whether it be mail or other property) draws the same penalty" 517 F.2d at 970.

erroneous advise by counsel and the Court is wholly without foundation. Appellant's guilty plea was voluntary and intelligent under the law as it then existed.[12]

POINT II

The intervening change in the law effected by *Rivera* and *Reid* does not require vacation of appellant's conviction.

Appellant claims, in the alternative, that even if *Rivera* and *Reid* did effect a "change in the law", he is entitled, as a result of that intervening change in the law, to collateral relief under Title 28 U.S.C. § 2255 in the form of an order vacating his conviction. Relying heavily on *United States* v. *Liguori*, 438 F.2d 663 (2d Cir. 1971), appellant maintains that his sentence under § 2114 was imposed for a crime which, under *Rivera* and *Reid*, he could not have been convicted. "Constitutional due process" and "the general principle of retroactivity" are said to mandate the requested relief. Appellant's argument overlooks substantial authority to the contrary.

The availability of collateral relief from a federal criminal conviction based upon an intervening change in substantive law has, in recent years, been considered by both the Supreme Court and this Circuit. *Davis* v. *United States*, 417 U.S. 333 (1974); *United States* v. *Loschiavo*,

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[12] Alternately, appellant suggests application of a theory of retroactivity which would give "general effect" to the interpretation of § 2114 set forth in *Reid* and *Rivera*, by holding that interpretation authoritative and all prior interpretations erroneous. Such a theory of retroactivity, described by this Court as "the splendid myth of discovered law" was rejected by an *en banc* panel of this Court in *United States ex rel Angelat* v. *Fay*, 333 F.2d 12, 15 (2d Cir. 1964).

531 F.2d 659 (2d Cir. 1976); *United States* v. *Travers*, 514 F.2d 1171 (2d Cir. 1974); *United States* v. *Liguori*, 430 F.2d 842 (2d Cir. 1970), *cert. denied*, 402 U.S. 948 (1971). Under none of those decisions would the appellant be entitled to the vacatur here sought.

In *Davis* v. *United States*, *supra*, the Supreme Court held that non-constitutional issues such as "an intervening change in the substantive law" may be raised by way of collateral attack under very limited circumstances. The "appropriate inquiry" to determine the availability of collateral relief is "whether the claimed error of law was 'a fundamental defect which inherently results in a complete miscarriage of justice', and whether '[i]t . . . present[s] exceptional circumstances where the need for the remedy afforded by the writ of *habeas corpus* is apparent' " 417 U.S. at 346; *Hill* v. *United States*, 368 U.S. 424, 429 (1962). Applying that standard, the *Davis* Court held that a "miscarriage of justice" would result, and "exceptional circumstances" would be established, where the intervening change in substantive law rendered non-criminal the act or conduct for which the petitioner was convicted.

Relying on *Davis*, this Court has twice held collateral relief warranted as a result of an intervening change in the law. In *United States* v. *Travers*, *supra*, the petitioner had been convicted after trial of mail fraud in violation of 18 U.S.C. § 1341. The evidence established that the defendant had participated in a scheme to use counterfeit credit cards. The charge of "mail fraud" arose out of the subsequent use of the mails by defrauded stores for the purpose of collecting for goods and services obtained by charges on the counterfeit cards. Subsequently, the Supreme Court in *United States* v. *Maze*, 414 U.S. 395, 1974, held that such subsequent mailings were not sufficiently related to the fraudulent scheme to fall within the

scope of §1341. In light of *Maze*, it was apparent that Travers stood convicted for conduct which no longer constituted a federal offense. In the face of such "exceptional circumstances", and to avoid "a complete miscarriage of justice", this Court ordered the granting of collateral relief. 514 F.2d at 1179.

Similarly, the requisite "exceptional circumstances" were found present in *United States* v. *Loschiavo, supra.* There, the defendant had been convicted, after a jury trial, of bribery, in violation of 18 U.S.C. § 201. The evidence established that he had bribed a deputy director of the New York Model Cities Administration, a recipient of federal funds. The defendant had alleged that the receiver of the bribe was not a "public official" as defined by §201(a). That contention was rejected, however, and he was convicted. His conviction was subsequently affirmed. Thereafter, in *United States* v. *Del Toro,* 513 F.2d 656 (2d Cir.), *cert. den'd.,* 423 U.S. 826 (1975), an unrelated case, this Court held that the very individual bribed by Loschiavo was in fact an employee of New York City, rather than of the federal government. He was not therefore a federal official as required under §201. Loschiavo then moved under §2255 for collateral relief from his conviction. Finding that, on the face of the record, the Government had failed to establish an essential element of the offense charged, this Court affirmed the granting of collateral relief. To do otherwise would have been to imprison Loschiavo for "something that was not a federal criminal offense" 531 F.2d at 665. As in *Travers*, such "exceptional circumstances" would render the denial of collateral relief a "miscarriage of justice".

Appellant's position differs substantially from that of the petitioners in *Davis, Travers and Loschiavo.*[13] Unlike

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[13] Nor does appellant's argument find any support in *United States* v. *Liguori,* a pre-*Davis* decision upon which appellant relies.

[Footnote continued on following page]

those cases, appellant's admitted conduct constitutes a federal criminal offense despite the "intervening change in the law" effected by *Rivera* and *Reid*. While the robbery of Talton may no longer be construed to be a violation of §2114, it remains, as Judge Mishler noted below, a violation of 18 U.S.C. § 641 which prohibits "steal[ing] . . . money of the United States or of any department or agency thereof." Similarly, the acts admitted by appellant at the time of his plea constitute now, as they did then, a violation of 18 U.S.C. §2112 which provides: "Whoever robs another of any kind or description of personal property belonging to the United States, shall be imprisoned not more than fifteen years." It was, of course, the absence of a federal criminal offense which served as predicate for collateral relief in *Travers* and *Loschiavo*. Since appellant failed to establish a similar "miscarriage of justice" by reason of the intervening change in the law here involved, his final conviction is not vulnerable to collateral attack.

Finally, appellant's contention that he would not have pleaded guilty "but for" the twenty-five year mandatory sentencing provision of §2114, which has since been held

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There, a similar standard was appled to effect the same result. Since an intervening change in the law rendered void a presumption of law on which petitioner's conviction had been predicated, this Court permitted collateral attack though the defendant had not raised the issue on direct appeal. A conviction based upon a record lacking evidence as to all the essential elements was held to have "a fatal constitutional taint for lack of due process" 438 F.2d at 669. Thus *Liguori*, like *Davis*, *Travers* and *Loschiavo*, implied that an intervening change in the law which resulted in incarceration for non-criminal conduct raised the otherwise non-constitutional change in the law to one of constitutional "due process" dimensions, thereby avoiding the procedural bar to collateral attack which normally attaches to a final conviction wherein the issue in question was not exhaustively contested by way of direct appeal, see *Sunal* v. *Large*, 332 U.S. 174 (1947).

inapplicable to his conduct by *Rivera* and *Reid*, is without effect. The Supreme Court in *Brady* v. *United States*, 397 U.S. 742 (1970) has rejected such claims for collateral relief in favor of the finality of guilty pleas. Insulating a voluntary and intelligently entered guilty plea from just such a claim as the appellant here raises, Mr. Justice White, writing for the *Brady* Court, stated:

> "A voluntary guilty plea made by light of then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise. A guilty plea triggered by expectations of a competently counseled defendant that the State will have a strong case against him is not subject to later attack because the defendant's lawyer correctly advised him with respect to then existing law as to possible penalties but later pronouncements of the Courts, as in this case, hold that the maximum penalty for the crime in question was less than was reasonably assumed at the time the plea was entered". 397 U.S. at 757. See also *Parker* v. *North Carolina*, 397 U.S. 790 (1970).

In conclusion, we respectfully submit that appellant's remedy, if any, was fashioned by the Supreme Court in *United States* v. *Hanahan*, 414 U.S. 807 (1973), *supra*. As Judge Friendly noted in *Rivera*, the *Hanahan* conviction, improperly based on §2114, was vacated and the case remanded for resentencing under §2112, which, though not charged, was violated. While that remedy was factually unavailable in *Rivera*, it would have been appropriate here had the appellant been convicted of the twenty-five year offense. Since his conviction and sentencing were for simple robbery, a ten-year offense which falls within the maximum provided by §2112, resentencing is unnecessary.

CONCLUSION

The District Court's order denying appellant's petition under §2255 should be affirmed.

Respectfully submitted,

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Of Counsel.

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

EVELYN VALENTI, being duly sworn, says that on the 12th day of January, 1977, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a BRIEF FOR THE APPELLEE of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Michael Young, Esq.
Legal Aid Society
Federal Defender Services Unit
509 U.S. Courthouse
Foley Square
New York, N.Y. 10007

Evelyn Valenti

Sworn to before me this
12th day of Jan. 1977

Carolyn M. Johnson

CAROLYN M. JOHNSON
NOTARY PUBLIC, State of New York
No. 41-4518298
Qualified in Queens County
Term Expires March 30, 19[illegible]